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No. 97-1287

In The

Supreme Court of the United States

October Term, 1997

HUGHES AIRCRAFT COMPANY and HUGHES NON-BARGAINING RETIREMENT PLAN,

Petitioners,

vs.

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. McMILLIN, ERNEST O. BLANDIN and RICHARD E. HOOK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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38 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit correctly followed *Lockheed Corp. v. Spink*, 116 S.Ct. 1783 (1996) by recognizing numerous material differences between this case and that one, including, among others, that this complaint alleges breach of ERISA's accrual, vesting and termination provisions and alleges a sham transaction contrived to conceal an illegal transfer of plan assets to a different plan.

2. Whether the Ninth Circuit correctly recognized, in harmony with precedent and the text of ERISA, that in addition to other significant differences between them, *Lockheed*, unlike this case, involved a purely employer-funded plan.

3. Whether the Ninth Circuit correctly recognized, in harmony with precedent, that participants in a contributory pension plan have rights expressly conferred by ERISA to assets derived from their own contributions.

4. Whether the Ninth Circuit correctly recognized, in harmony with precedent, that an employer, in appropriate circumstances, can be ordered to effect termination of a plan (including distribution of its assets) using the means specified in the termination provisions of ERISA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

Statutes and Regulations

Other

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This petition seeks review of the Ninth Circuit's refusal, on a § 12(b)(6) motion, to dismiss a complaint alleging that after employee contributions to a defined benefit pension plan enabled it to accumulate a $1.2 billion surplus, the employer closed the plan to new participants and substituted a different, noncontributory plan for new employees and current participants who elected to switch plans. By freezing participation in the contributory plan, Hughes limited the accrual of new benefits. As a result, surplus plan assets far exceed any possible future liabilities, so that surplus, left to itself, would simply continue to grow forever. The complaint alleges that this surplus, including the majority of the surplus which is derived from employee contributions, is being used by Hughes to meet its separate obligations under the new noncontributory plan.

The Ninth Circuit found that if the allegations are proven, the District Court has power to order termination of the contributory plan as a wasting trust. Termination would be effected under Title IV of ERISA, 29 U.S.C. § 1341 *et seq.*, whose § 1344 requires, among other things, that surplus derived from employee payments be "equitably distributed" to those who made them. The Ninth Circuit also found that diversion of plan assets derived from employee contributions to meet separate employer obligations to the new noncontributory plan may breach other provisions of ERISA, including its vesting, accrual, fiduciary and prohibited transaction rules; and that whether the old and new plans (which have different funding sources, benefits and beneficiaries) are indeed two plans or merely two "benefit structures" as Hughes prefers to call them, should be considered in the first instance by the District Court.

Review by this Court is unnecessary. Contrary to claims that the holding "flouted" *Lockheed Corp. v. Spink*, 116 S.Ct. 1783

(1996), "effected a revolution," and wreaked "havoc... across a vast expanse" of law (Pet. 1), the decision conflicts neither with *Lockheed* nor with any other holding of this Court or a Court of Appeals. It is carefully limited to unusual facts:

> "At the heart of this dispute is whether Hughes is entitled to use and control for its *own* benefit the Contributory Plan's one billion dollar surplus, approximately half of which was generated by employee contributions. This is *not* a case in which the pension plan at issue was funded entirely by employer contributions. Nor is this a case in which the employer used the plan's asset surplus *solely* to benefit participants of the plan.... plaintiffs allege that the employer used the Contributory Plan's asset surplus attributable in part to employee contributions for its own benefit and for the benefit of employees who were never participants in the Contributory Plan." App. 5a.

"No discovery was ever taken," App. 4a, and the facts are undeveloped. Even assuming *Lockheed* may one day need explication, this case, which does not turn on interpretation of *Lockheed*, does not conflict with any other reported decision, and calls for the development of an as-yet-absent factual record, is inappropriate to provide it. The petition should be denied.

STATEMENT OF THE CASE

Petitioners characterize this case as "about respondents' quest for a 'pot of gold.'" Pet. 1. They fail to mention that the pot was filled by employees, putting in a portion of their hard earned salaries. Respondents are participants in Hughes' contributory pension plan (the "Plan" or "Contributory Plan") which when Hughes froze participation and thus restricted accrual of benefits -- after four years in which *only* employees, *not* the employer, contributed (App. 3a, 136a) -- possessed a surplus ("assets [that] exceeded the actuarial or present value of accrued benefits") of $1.2 billion. App. 2a-3a, 137a.

Concerning the origins of this surplus, as on other points noted below, petitioners misstate what would be before this Court were certiorari granted. With *no* factual basis, petitioners assert that the Plan "invested its assets wisely, with excellent results" and that plaintiffs seek "to grab those investment returns for themselves." Pet. 2. There is *nothing* in the record about the Plan's investments. A developed record would likely show that the surplus came from: (1) return on Plan assets (derived from both employee and employer contributions) at rates any prudent investor would have realized, (2) employee contributions made after Hughes stopped contributing, and (3) forfeitures of benefits of non-vested participants when divisions and plants were closed or sold. What *is* in the record, is that "As of January 1, 1992, approximately half the surplus in the Contributory Plan was attributable to employee contributions." App. 3a.

Hughes sponsored the Plan for many years, making contributions to supplement those paid voluntarily by participating employees. In 1986 Hughes was sold to General Motors; Plan surplus was then almost $1 billion, while GM's own retirement plan was $7 billion underfunded. After the GM purchase, Hughes stopped making contributions to the Plan but continued to require participants to contribute. The surplus grew to $1.2 billion. App. 2a-3a, 137a. In 1991, Hughes froze the Plan and substituted the new Non-Contributory Plan which pays different, far lesser benefits.[1] No new participants could join the Plan. New employees, those not already in the Plan, and any who dropped out

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[1] According to petitioners, only "2% of the employee participants participating in the contributory benefits structure elected to change to the non-contributory benefits structure." App. 146a.

became participants in the new Non-Contributory Plan automatically.

In another misstatement of what would be before this Court were certiorari granted, petitioners call this an "amendment" that gave some participants in what remains a single plan a choice between two "benefit structures." Pet. 5. At another point, petitioners call it a "routine" amendment. Pet. 15. Plaintiffs allege, as discussed below, that the "amendment" was so far from "routine," that it effectively reduced the Plan to a wasting trust. As the Ninth Circuit summarized facts alleged,

> "Although created through an 'amendment' to the Contributory Plan, the Non-Contributory Plan shares virtually no characteristics with the older plan, other than administration by the same trustees." App. 3a-4a.

The Ninth Circuit found that to decide if separate plans exist requires a better developed record (App. 10a-12a, 16a-17a, 23a), and this finding is *not* among those on which petitioners have sought review. See "Questions Presented," Pet. i.

Respondents brought this action in 1992, alleging that Hughes' effective termination of the Plan, and use of surplus derived largely from employee payments to meet Hughes' separate obligations under the new Non-Contributory Plan, breached several clauses of ERISA. According to the complaint, freezing participation in the Plan and thus circumscribing accruals left it with assets "substantially in excess of those required to fund all current and future pensions" (App. 138a): assets which since the Plan continued to receive both employee contributions and investment income, were bound to increase still further. From its inception in 1991, the so-called "non-contributory benefit structure" -- really a separate plan -- was funded not by Hughes, but out of this surplus of the Contributory Plan. App. 4a. In short,

the Plan had been rendered a "wasting trust" whose corpus was of no use to its beneficiaries and which, plaintiffs argued, must be ordered terminated.

Under ERISA, any such termination would have to be effected in accordance with § 1344 which requires, among other things, that surplus derived from participant contributions be "equitably distributed" to those who made them. Hughes, the complaint alleged, failed to follow § 1344 (as well as the rest of Title IV of ERISA), and should be ordered to do so. Plaintiffs also claimed that Hughes' diversion of Plan surplus derived from participant contributions to meet separate employer obligations under the new Non-Contributory Plan breached other sections of ERISA: 29 U.S.C. §§ 1103 (plan assets "shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants"), 1104 (plan fiduciaries must act "solely in the interest of the participants"), 1053 ("an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable"), and 1106 (prohibiting the transfer of plan assets to a party in interest). A sixth cause of action relates to Hughes' use of Plan surplus in 1989 to fund an early retirement incentive program. App. 139a-143a.

The district court dismissed the complaint, but the Ninth Circuit found that each cause of action states a claim on which relief may be granted, reversed, and remanded. As already stated, the court held that whether there are distinct contributory and non-contributory plans or just two "structures" of a single plan must first be addressed by the district court on developed facts, and this is not a question on which petitioners have sought review.[2]

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[2] In a footnote, petitioners do cite a regulation which defines a "plan" as "single" if all assets are available to pay all benefits, even if the "plan" has "distinct benefit structures which apply to the same or different participants." Pet. 20 n. 6, citing 26 C.F.R.§ 1.414(l)-(1),

(continued...)

The Ninth Circuit also held that when the Plan was frozen in 1991, it may have become a wasting trust under common law principles.

> "Only after discovery can the district court properly determine whether the Contributory Plan's purposes have been accomplished and whether its liabilities are fixed enough to terminate the plan." App. 11a n. 3.

If this factual question is ultimately resolved in plaintiffs' favor the District Court could, under the Ninth Circuit's ruling, order Hughes to terminate the Contributory Plan pursuant to ERISA Title IV, including both equitable distribution of surplus derived from employee contributions as required by 29 U.S.C.§ 1344, and such other Title IV requirements as supervision by the Pension Benefit Guaranty Corporation.

In yet another misstatement of what would be before this Court were certiorari granted, petitioners characterize this as a decision on the question "whether Title IV of ERISA provides the exclusive means of terminating a defined-benefit plan," a holding that the Plan "could be terminated other than by" those means. Pet. 3 and 24; see also Pet. i and 21-5. Neither plaintiffs nor the Ninth Circuit ever suggested bypassing the means for termination set

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reprinted at App. 128a. The regulation itself states it applies only "[f]or purposes of this section" dealing with the effect on plans' tax qualification of their merger, consolidation and transfer provisions. *Cf. PBGC v. Artra Group, Inc.*, 972 F.2d 771 (7th Cir. 1992), discussing tax qualification of single- and multiple-employer plans.

forth in Title IV.[3] Plaintiffs' request is precisely that Hughes be ordered to use those means.

Similarly, contrary to the claim that the decision "flouted" *Lockheed*, the Ninth Circuit carefully considered that as well as other decisions by this and lower courts. *Lockheed*, the Ninth Circuit explained, held that amendment of a noncontributory pension plan to increase some participants' benefits could not violate ERISA -- provided no ERISA clauses other than 29 U.S.C. § 1104 were violated -- because the employer amended the plan as sponsor, not as a fiduciary. App. 7a-8a.

The complaint in this case, however, alleges breach of accrual, vesting and termination provisions of ERISA, not just the fiduciary duty provision in § 1104. *Lockheed*, as the Ninth Circuit pointed out, "specifically noted that 'there is no claim in this case that the amendments resulted in any violation of'" ERISA's structural requirements. App. 21a n. 8 and 24a, quoting 116 S.Ct. at 1790 n. 5.

The complaint, moreover, alleges that what petitioners call an "amendment" was really a sham transaction that closed the Plan in order to transfer its assets to the new non-contributory plan which had different participants. *Lockheed*, as the Ninth Circuit also pointed out, expressly recognized that "a sham transaction, meant to disguise an otherwise unlawful transfer..., might present a different question from the one before us." App. 24a, quoting 116 S.Ct. at 1792 n. 8. For both these reasons as well as others stated by the Ninth Circuit (App. 7a-8a, 10a, 12a n. 4, 14a, 17a, 21a n. 8, 24a, 25a), *Lockheed* was quite different from this case.

[3] To minimize the possibility of such misreading, the Ninth Circuit amended its opinion after Hughes filed a motion for rehearing, deleting certain references to when a termination occurs. App. 11a, 22a-23a, 49a-50a.

Petitioners' characterization of what would be before this Court were certiorari granted is especially misleading because the petition discusses only one of the several distinctions drawn by the Ninth Circuit between this case's facts and those in *Lockheed*. The Ninth Circuit noted as *one* significant difference between this case and *Lockheed* that Hughes' Plan, unlike the noncontributory plan in *Lockheed*, was largely employee-funded. But as summarized above, the Ninth Circuit also stressed that plaintiffs here, unlike in *Lockheed*, allege both structural violations of ERISA's accrual, vesting and termination provisions, and a sham "amendment" that really involved the transfer of Plan assets to a different plan. E.g., App. 7a-8a, 17a-18a, 21a n. 8, and 24a. The petition (wrongly) minimizes the significance of the first distinction. It completely ignores all the others. Pet. 10-20.

While sustaining the validity in the face of a motion to dismiss of each of plaintiffs' claims, the Ninth Circuit made clear that it was neither making factual findings (e.g., App. 11a n. 3, 21a n. 6) nor even deciding exactly how much plaintiffs must prove to establish each cause of action:

> "The simple question before us is whether plaintiffs have alleged sufficient facts in their complaint to state *any* claim for relief under ERISA." App. 2a.

Petitioners filed a suggestion for rehearing en banc. Not a single judge of the entire Ninth Circuit, not even Judge Norris who had dissented from the panel's decision, requested a vote on the suggestion. App. 50a.

One more distortion in the Petition, discussed in more detail below (pp. 29-30), should be identified. A claim that review is appropriate because contributory defined benefit plans "cover more than 1 million American workers and retirees, and hold more than $60 billion in assets" (Pet. 16) is not based on the record, is not germane to the legal issues, and also, although purporting to show

that this case has widespread significance, actually underlines the highly unusual nature of the facts alleged in the complaint. There is no reason to think such facts are common or can be commonly alleged.

That the Petition includes so many misstatements reflects the lack of any actual reason to grant the writ. This case has great importance to Hughes, which wants to keep using the Plan's "pot of gold" (by now, filled even higher than in 1991) to pay Hughes' separate obligations to the new Non-Contributory Plan.[4] The holding below simply affirms that ERISA cannot be ignored. That may limit Hughes' access to Plan surplus or irk employers that would prefer complete freedom of action, but it hardly calls for Supreme Court review.

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[4] Forms 5500 filed by Hughes confirm that it has continued not to contribute to either plan, instead using Plan surplus to meet employer obligations. The most recent Form 5500 (for the year ending November 30, 1996 and covering both "benefit structures" on a consolidated basis) shows the Hughes Non-Bargaining Retirement Plan with $5.5 billion in net assets and $4.0 billion in projected liabilities (including those under the new non-contributory plan), confirming plaintiffs' prediction that Plan surplus will continue to grow.

The "pot of gold" image used by petitioners is telling. Hughes' amassing of the money it now claims indeed recalls the folklore of leprechauns: "In the night time we go about the country into people's houses and we clip little pieces off their money, and so, bit by bit, we get a crock of gold together." James Stephens, *The Crock of Gold*, ch. 8 (1912). But while leprechauns were little people saving a ransom for use if captured, Hughes just wants to pay its bills with the Plan's money.

REASONS FOR DENYING THE WRIT

In terms of the considerations governing certiorari stated in this Court's Rules, the Petition purports to offer two arguments. First, it claims that the decision below conflicts with this Court's ruling in *Lockheed*. See the first "Question Presented," Pet. i, and Pet. 10-13. It also claims the decision conflicts with other Circuits on any of three issues: the reach of *Lockheed* (second "Question Presented and Pet. 14-5), the existence of employee interest in plan assets derived from employee contributions (third "Question Presented" and Pet. 16-20), or the means required for termination of ERISA plans (fourth "Question Presented" and Pet. 21-5). Finally, the petition claims the decision will have "staggering" or "extraordinary" impact. Pet. 15-6. None of these contentions withstands scrutiny.

I. The Ninth Circuit did not "refuse to follow" *Lockheed* nor does the decision below conflict with *Lockheed*.

Petitioners claim the Ninth Circuit "flouted" or "refused to follow" *Lockheed*. Pet. 1, 10-13. They summarize *Lockheed* as holding that amendment of any type of pension plan, contributory or not, does not involve a fiduciary duty. As shown below (pp. 14-18), such a characterization of *Lockheed*'s holding is too sweeping. But more fundamentally, even if it were correct, the Ninth Circuit's decision still would not conflict with *Lockheed* since the Ninth Circuit recognized numerous differences between this case and *Lockheed*, mentioning the Plan's contributory nature as just one. Petitioners simply ignore most distinctions recognized by the decision below between *Lockheed* and this case.

A. This is not just a fiduciary duty case, but alleges breach of ERISA's structural requirements.

Contrary to the petition's presentation, this is not just a fiduciary duty case alleging violation of 29 U.S.C. § 1104 (or even

one alleging a prohibited transaction under § 1106). The complaint alleges, as the Ninth Circuit summarized it, that when "amending" the Plan Hughes "violated ERISA's vesting, nonforfeiture, and distribution requirements under 29 U.S.C. §§ 1053(a) and 1344." App. 8a.

Lockheed endorsed cases like *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995) which say that fiduciary functions do not, in general, include plan design. 116 S.Ct. at 1789 and n. 4. But *Lockheed* also expressly recognized that parts of ERISA other than its fiduciary provisions do govern plan amendments. 116 S.Ct. at 1790: "While other portions of ERISA govern plan amendments,... the act of amending a pension plan does not trigger ERISA's fiduciary provisions."

As the Ninth Circuit pointed out, *Lockheed* "specifically noted that 'there is no claim in this case that the amendments resulted in any violation of'" such structural ERISA requirements. App. 21a n. 8 and 24a, quoting 116 S.Ct. at 1790 n. 5. That an employer in designing a plan is free, regardless of motivation, to choose any structure which ERISA permits, does not mean it is also free to choose a prohibited structure. Similarly this Court in *Varity Corp. v. Howe*, 116 S.Ct. 1065, 1075-8 (1996), held that 29 U.S.C. § 1132(a)(2) allowing suits for breach of the fiduciary duties imposed by ERISA is supplemented by § 1132(a)(3), "a safety net, offering appropriate equitable relief for" other ERISA violations.

That *Lockheed* does not require dismissal of this complaint is obvious. Plaintiffs do allege breach of clauses of ERISA other than § 1104 and § 1106: § 1103's bar on inurement of plan assets to the employer's benefit (which as the Ninth Circuit said, App. 8a, has never been held to be "only triggered when an employer is acting as a fiduciary"), § 1053's bar on forfeiture of "an employee's rights in his accrued benefit derived from his own contributions," and § 1344's requirements for plan terminations. *Lockheed* held

the payment of benefits "to plan participants and beneficiaries pursuant to the terms of an otherwise lawful plan" to be beyond the scope of § 1106's ban on transactions with a party in interest. 116 S.Ct. at 1790. There was no claim that the amendments at issue in *Lockheed* rendered the plan *not* "otherwise lawful" by causing "any violation of the participation, funding, or vesting requirements of ERISA." *Id.* n. 5.

Those sections, at issue here, apply regardless whether the employer acts as sponsor or fiduciary. Accordingly, *Lockheed* plainly does not foreclose this case.

B. This is not just an amendment case, as the so-called "amendment" at issue was allegedly a sham.

Lockheed, as the Ninth Circuit also said, also expressly recognized that "a sham transaction, meant to disguise an otherwise unlawful transfer..., might present a different question from the one before us." App. 24a, quoting 116 S.Ct. at 1792 n. 8. For this reason too, petitioners' argument -- that *Lockheed* holds that an empoyer's motive for amending a plan does not matter -- is beside the point.

The Ninth Circuit correctly found, in a holding which petitioners have not asked this Court to review, that to decide if what happened here was indeed the amendment of a continuing plan as petitioners claim -- or the closing of the Plan, creation of another, and diversion to it of Plan assets for Hughes' benefit as plaintiffs allege -- requires a developed record. If that question is ultimately resolved in plaintiffs' favor, the employer's use of one plan's assets to fund another plan will clearly be both a prohibited transaction under § 1106 and a § 1104 breach of fiduciary duty.[5]

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[5] *See, e.g., Donovan v. Mazzola*, 715 F.2d 1226, 1231, 1237-8 (9th (continued...)

Commissioner v. Keystone Consolidated Industries, Inc., 508 U.S. 152 (1993), held that an employer's transfer to a defined benefit pension plan even of unencumbered, fairly valued property breached the Tax Code's prohibited transaction clause, a companion to 29 U.S.C. § 1106. The clauses, the Court explained, bar any "transfer of property in satisfaction of a debt," closing what before ERISA was "an open door for abuses such as... the sponsor's satisfaction of a funding obligation by contribution of property that was overvalued or nonliquid." *Id.* at 159-60. The uncompensated transfer of Plan assets to meet Hughes' non-plan obligations, if proven, will be a more egregious prohibited transaction.

It will breach § 1104 as well. The allegedly unlawful diversion of Plan assets required cooperation from Plan fiduciaries, such as the administrator which used Plan assets to pay benefits under the new noncontributory plan, and could not have been implemented by Hughes acting solely as settlor. *Lockheed* distinguishes settlor and fiduciary acts. It does not authorize schemes to divert assets from a plan. For this reason too, there is no conflict between the holding below and *Lockheed*.

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[5](...continued)
Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984), which found a "per se prohibition against a loan between two funds where the trustees are identical but the participants and beneficiaries are not" -- a situation quite similar to that here, in which Hughes is using Plan assets to fund another plan. (As discussed earlier, Hughes' claim that there are two "structures" of a single plan was remanded to the District Court, in a finding on which the petition does not seek review.) *Mazzola* also noted that ERISA makes the common law of trusts even "more exacting." Labeling an improper decision an "amendment" does not always insulate it from fiduciary review. See, *e.g., Heath v. Varity Corp.*, 71 F.3d 256, 259 (7th Cir. 1995) (doubting that a plan could be amended to exclude an employee by name).

C. Noticing that *Lockheed* dealt with a noncontributory plan is not "refusal to follow controlling authority."

In addition to pointing out, as already discussed, that the complaint here makes allegations completely different from those in *Lockheed* and expressly distinguished in the *Lockheed* opinion, the Ninth Circuit also pointed out that *Lockheed*, unlike this case, involved a purely employer-funded plan. Petitioners (while totally ignoring other points which are themselves dispositive) describe the recognition of difference between contributory and noncontributory plans as "refusal to follow" *Lockheed*. They also describe the "ostensible distinction between contributory and non-contributory plans" as "meaningless." Pet. 13.

1. The logic of *Lockheed* permits distinctions between contributory and noncontributory plans.

While petitioners argue that *Lockheed* did not "even mention whether the plan was contributory" (Pet. 12-13), its reasoning nonetheless makes the plan's nature relevant. Especially in a case alleging diversion of Plan assets to non-participants in the Plan, there is an obvious distinction between an employer-funded pension plan like the one *Lockheed* found could be amended without reference to fiduciary duties, and one largely funded by the employees themselves.

Lockheed explains its conclusion (quoted by petitioners) that "the act of amending a pension plan does not trigger ERISA's fiduciary provisions" as follows. *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223, 1228 (1995), had already found employers "generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans," and *Lockheed* found "no reason why the rule of *Curtiss-Wright* should not be extended to pension benefit plans." It pointed out that 29 U.S.C. § 1002(21)(A), defining fiduciary status in terms of discretion

"respecting management of such plan or... any authority or control respecting management or disposition of its assets," does not distinguish welfare from pension plans, and that most lower courts had found that the fiduciary functions listed in § 1002(21)(A) "do not include plan design." As *Lockheed* summarized *Curtiss-Wright*, when employers "'adopt, modify or terminate welfare plans'..., they do not act as fiduciaries... but are analogous to the settlors of a trust." 116 S.Ct. at 1789-90.[6]

While one definition of "fiduciary" thus applies to welfare and pension plans, and the mere "act of amending a pension plan" does not in and of itself "trigger ERISA's fiduciary provisions," this hardly means there can be no relevant difference between contributory and noncontributory pension plans. The opposite is true. The basis stated in *Curtiss-Wright* for holding employers can generally amend welfare plans for any reason was that ERISA, as the Court put it, "does not create any substantive entitlement to" welfare benefits. 115 S.Ct. at 1228. Welfare plans are also virtually always pay-as-you-go, without the pre-funding that characterizes pension plans. As *Curtiss-Wright* said, ERISA does not mandate "participation, vesting, or funding requirements for welfare plans as it does for pension plans." *Id.*

The prospective amendment of a welfare plan, even one that is contributory, can therefore almost never be said to breach the employer's statutory obligations, to "dispose of" current plan assets, or to deprive employees of a benefit they funded themselves. In these respects relevant to deciding whether amending a plan implicates fiduciary duties, contributory and non-contributory welfare plans are hardly different; they are also

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[6] *Varity Corp. v. Howe*, 116 S.Ct. 1065, 1070, 1073-4 (1996), recently reaffirmed that ERISA has its "starting point" in "ordinary trust law." *Cf. Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) ("ERISA abounds with the language and terminology of trust law.").

comparable, as discussed below, to non-contributory pension plans like the one to which *Lockheed* extends "the rule of *Curtiss-Wright*." 116 S.Ct. at 1789. Things are quite different for a contributory pension plan.[7]

To the extent that ERISA does *not* leave employers free to design plans however they wish, "the rule of *Curtiss-Wright*" does not require freedom from fiduciary scrutiny. To repeat a point made earlier, that an employer designing a plan is free, regardless of motivation, to choose a structure which ERISA permits, does not mean it is also free to choose what the statute specifically prohibits.

ERISA, as *Curtiss-Wright* said in explaining its holding, does not mandate "participation, vesting, or funding requirements for welfare plans." The statute has such requirements for pension plans, but the amendment which *Lockheed* found permissible regardless of the employer's motives was not alleged to contravene them. 29 U.S.C. § 1053, however, makes nonforfeitable an employee's "accrued benefit derived from his own contributions," a vesting requirement for contributory pension plans which has no counterpart for noncontributory plans (or any welfare plan). Hughes' actions here allegedly contravened that section.

Curtiss-Wright and *Lockheed* found plan design a matter free from fiduciary standards because ERISA places no limits on employer choice. To the extent an amendment impairs vesting rights which ERISA, as a substantive matter, requires -- as was allegedly true here -- that employers "generally" can design what they like is beside the point.

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[7] For this reason, claims that the holding below will unsettle the law of "health plans, disability plans, and a wide range of other welfare plans" and "could [not] be limited to contributory defined-benefit pension plans" (Pet. 15-6) are insubstantial.

The same point can be made another way. That one definition of "fiduciary" governs all benefit plans, as *Lockheed* held, does not imply that specific facts to which the definition applies are to be ignored. As this Court recognized in *Varity Corp. v. Howe*, 116 S.Ct. 1065 (1996), the words of § 1002(21)(A) "are not self-defining." Some circumstances fall "clearly neither within nor outside of the common understanding of" the words, and in those circumstances, courts "look to the common law." *Id.* at 1073.

Amending a contributory pension plan (unlike either a noncontributory plan or a welfare plan, even a contributory one that operates pay-as-you-go) may well "dispose of" current plan assets that derived from employee contributions.[8] Moreover the participants in such a plan, no less than the employer, are "analogous to the settlors of a trust." *Lockheed*, 116 S.Ct. at 1790.

As the Ninth Circuit put it, when a plan is funded by both the employer and employees they are essentially "*co*-settlors of the plan." App. 14a. Such a description conforms to settled trust law. "A person who furnishes the consideration for the creation of a trust is the settlor, even though in form the trust is created by

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[8] Petitioners criticize the Ninth Circuit's comment, App. 16a, that "Hughes was disposing of the plan's assets when it amended the plan," asserting, though not really arguing, that this is refuted by *Lockheed* and *Siskind v. Sperry Retirement Program*, 47 F.3d 498 (2d Cir. 1995). Pet. 12 n. 1. Petitioners completely ignore the crux of the comment, namely that Hughes, while ostensibly "amending" the Plan, allegedly actually disposed of its assets by closing it and making it a wasting trust. Even setting this aside, however, the discussion here shows that *Lockheed* and *Sperry* do *not* refute the idea that amending a contributory pension plan can "dispose of" its assets within the meaning of § 1002(21)(A).

another person." *Scott on Trusts* § 156.3 at 180 (4th ed. 1987).[9] *Cf. Ruocco v. Bateman, Eichler, Hill, Richards, Inc.*, 903 F.2d 1232, 1239 (9th Cir.), *cert. denied*, 498 U.S. 889 (1990) (employer was not the settlor of a disability fund or entitled to its surplus assets, where employees paid the premiums); *Mine Workers v. Boyle*, 418 F.Supp. 406, 409 (D.D.C. 1976), *aff'd*, 567 F.2d 112 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 956 (1978) (employer rather than beneficiaries was the settlor of a fund since "From its inception, the Pension Trust has been non-contributory and a gratuity by the UMWA to its former employees"). *Lockheed*'s finding that an employer which is analogous to a traditional trust's settlor may alter the plan without reference to fiduciary standards does not dispose of cases in which employees, as well as the employer, resemble traditional trust law's settlors.

Lockheed, as mentioned earlier, cites *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995), for the rule that fiduciary functions do not, in general, include plan design. 116 S.Ct. at 1789 and n. 4. *Sperry* itself shows that the general rule is not universal. Contrasting a single-employer plan "funded entirely by Sperry," *Sperry* expressly recognized that courts "have treated plan amendments as fiduciary functions" when faced with multiemployer plans with employee as well as employer trustees. 47 F.3d at 505-6. The Plan here, with assets largely derived from employee contributions, resembles such plans more than it does the one found subject to employer amendment in *Lockheed*. That that case did not discuss facts not before the Court, hardly shows such facts never make a difference.

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[9] Compare *Bogert on Trusts & Trustees* § 41 at 128 (2d ed. 1984): "One who furnishes the consideration necessary to induce another to create a trust is the settlor of the trust when it is created."

2. The distinction between contributory and noncontributory plans, which petitioners call "meaningless," is statutory.

Petitioners, quoting Judge Norris in dissent, call the distinction between contributory and non-contributory plans which the Ninth Circuit recognized "meaningless" because

> "The only practical difference between the two types of plans is whether the employer funds them *directly*, through contributions to the plan, or *indirectly*, through wages paid to employees that the employees then contribute. 'In terms of economic reality,... [e]ither way, the contributions are the economic product of the employee's services.'" Pet. 13.

That both employer and employee contributions spring from employee services better supports enhanced employee rights to *all* Plan assets, than unlimited employer rights. In any event both common sense and ERISA recognize a difference between employer payments to a plan, and money earned by employees as wages which they then choose to contribute.

Petitioners' refusal to see this demonstrates both faulty reasoning and arrogance. Employees who voluntarily contribute to a plan do so *with their own money*. That this comes from wages no more makes it Hughes' money, than the fact that workers pay a home mortgage out of wages means that Hughes bought them the house. What is decisive, in any event, is that ERISA, as even the dissent below concedes (App. 37a), distinguishes employee from employer contributions to plans: for example, in 29 U.S.C.§§ 1344 and 1053. As the Ninth Circuit said, these provisions make clear

> "that Congress intended to distinguish... plan assets attributable solely to employer contributions from

plan assets attributable in part to employee contributions." App. 9a.

These provisions which treat employee and employer contributions differently -- regardless what might be said about "economic reality" -- are consistent with the normal equitable practice which as discussed above, treats those who supply the consideration for a trust as its settlors. As the Ninth Circuit put it, when a plan is funded by both the employer and employees, they are essentially *co*-settlors. App. 14a. This Court recently reaffirmed in *Varity* (see note 6 above) that such common-law principles are often the starting point when interpreting ERISA -- even in the absence of specific ERISA clauses such as those already cited. In recognizing the possibility of distinction between employee and employer contributions, the Ninth Circuit properly followed not its own view of "economic reality," but that of both settled trust law, and Congress when it enacted ERISA.

II. There is no conflict between the Ninth Circuit's ruling and those of other Circuits.

Petitioners also claim the holding below conflicts with those of other Circuits, on three issues: the reach of *Lockheed*, the existence of an employee interest in employee contributions, and the means necessary to terminate an ERISA plan..

A. There is no conflict with other Circuits about the reach of *Lockheed*.

The petition claims that even if *Lockheed* "could be limited to non-contributory plans, the decision below would still merit review" because it conflicts with those of other Circuits on this issue. Pet. 14-5. As already discussed, limitation to non-contributory plans was far from the only reason given by the Ninth Circuit for concluding that *Lockheed* does not dispose of this complaint. The cases from other Circuits cited by petitioners, like

Lockheed itself, did not involve alleged violations of ERISA's structural requirements, or claims that so-called "amendments" were really sham transactions contrived to divert plan assets to another plan.

Even setting that aside, there is plainly no conflict with other Circuits about the reach of *Lockheed*, which none of the pre-*Lockheed* decisions cited by petitioners even discusses. The decisions cited found on the facts of those cases that amendments to contributory pension plans were settlor acts and not fiduciary violations. They did not construe *Lockheed*, nor do they conflict with the Ninth Circuit's holding in any other respect.

The Ninth Circuit specifically distinguished one such case, *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir. 1994), in which the employer

> "chose to give an extra benefit to one group of employees within a larger group.... There was *no* allegation... that the employer transferred assets from one plan to another or that the asset surplus was used to benefit employees who were not participants." App. 17a.

Similar distinctions might be drawn with respect to each of the other pre-*Lockheed* cases cited in the petition.

Other courts besides the Ninth Circuit have applied fiduciary standards both to amendment of trusteed employee-employer plans (as discussed in *Sperry, supra*), and to the allocation of assets between old and newly created plans. *E.g.*, *John Blair Communications, Inc. Profit Sharing Plan v. Telemundo*

Group, Inc. Profit Sharing Plan, 26 F.3d 360, 368-70 (2d Cir. 1994).[10]

More fundamentally, even assuming this Court might some day need to clarify whether under *Lockheed*, amendment of a contributory pension plan can implicate fiduciary duties, there is surely no occasion to do so here. Lower courts have not addressed the question in light of *Lockheed*, nor has any conflict about *Lockheed*'s interpretation arisen. In light of other issues raised by the complaint and not yet factually developed, the question, however construed, would not decide this case. Whatever questions *Lockheed* may have left to future cases, it is hard to imagine one less appropriate than this one to resolve them.

B. There is no conflict with other Circuits about employees' interest in their own contributions.

The petition claims that the decision below conflicts with those of other Circuits by resting on an "erroneous premise that respondents have a property interest not only in their defined benefits under the Plan, but also in the assets held by the Plan." Pet. 16-20. The cases cited to support the claim, beginning with *Georgia-Pacific*, and the Ninth Circuit's discussion and distinction of these cases, have both been described in the preceding section.

Moreover, 29 U.S.C. § 1344, as the Ninth Circuit recognized (App. 22a) provides expressly that upon a plan termination, surplus plan assets may not revert to an employer unless the plan so provides (which the complaint here alleges is not the case) and more important, that even if there is a reversion provision, surplus assets attributable to employee contributions

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[10] While *John Blair* involved defined-contribution plans, ERISA, as discussed above, vests employee interests in their own contributions even for defined-benefit plans.

must be "equitably distributed" to the employees who made them. In the complaint here, unlike cases cited in the petition, Hughes' alleged attempt to bypass this requirement is at issue.

The erroneous premise underlying petitioners' argument -- that there is no difference under ERISA between employee and employer contributions -- has already been discussed as well. The Ninth Circuit correctly rejected arguments that as long as employees receive what was promised them under a defined benefit pension plan, they have no possible complaint.

Petitioners implicitly liken Hughes to an insurer, and Judge Norris in dissent argued that plan sponsors which face the risks of "bad times (when declines in the value of assets make plans underfunded)" should in good times "benefit from surpluses." Pet. 17, App. 29a. As the decision below recognized, however, *ERISA plans are not insurance policies* but funds held in trust (29 U.S.C. §1104) under strict regulation for the exclusive benefit of participants (§1103). *Cf. Clothing & Textile Workers v. Murdock*, 861 F.2d 1406, 1409, 1417 (9th Cir. 1988) (authorizing a constructive trust over surplus plan assets which an employer sought to recoup for itself, even though no one was actually hurt by a breach of fiduciary duty and all participants "received their actuarially authorized benefits").

29 U.S.C. §1053 expressly states that "an employee's rights in his accrued benefits derived from his own contributions are non-forfeitable," requiring that participants always be 100 per cent vested in their own contributions. Petitioners acknowledge in a footnote that under §§ 1053 and 1054 employees, "regardless of the level of defined benefits,... have a 'vested right' to receive benefits equal to their mandatory contributions plus an imputed rate of interest." Pet. 18 n. 4. In other words, participant interest in plan assets *can* exceed the benefits promised by a defined-benefit plan, if assets derived solely from employee contributions

exceed those benefits. As the Ninth Circuit recognized (App. 19a), that is what is claimed here.

Other courts besides the Ninth Circuit have recognized the obvious point that under ERISA, employees have interests in assets derived from their own contributions. Indeed even before § 1344 codified employees' equitable right to a share of surplus on plan termination, the right was recognized by the D.C. Circuit, and the argument advanced for petitioners, that employers which bear investment risk should reap its profit, was rejected. *Bridgestone/Firestone, Inc. v. PBGC*, 892 F.2d 105, 111 (D.C.Cir. 1989). *Cf. Ruocco v. Bateman, Eichler, Hill, Richards, Inc.*, 903 F.2d 1232, 1238 (9th Cir.), *cert. denied*, 498 U.S. 889 (1990); and *Borst v. Chevron Corp.*, 36 F.3d 1308, 1315 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1699 (1995), explaining that

> "so far as concerns surplus assets,... ERISA ... markedly distinguishes between those attributable to employee contributions and those attributable to employer contributions."[11]

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[11] *See also Chait v. Bernstein*, 835 F.2d 1017 (3d Cir. 1987). That case stressed that the plan whose surplus assets were being allowed to revert to the employer was wholly employer-funded, and contrasted *Delgrosso v. Spang and Co.*, 769 F.2d 928 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986), in which the employer was *not* allowed to amend its plan. This employer, on realizing that a defined contribution plan was well funded, had changed it to a defined benefit plan, paying

> "no new sums into the fund after the conversion.... Obviously, the employer under these circumstances did not present a sympathetic case for reversion of surplus." *Chait*, 835 F.2d at 1025.

While the technical basis for *Spang*'s ruling was that employer (continued...)

To vary an analogy already used, that Hughes sponsored the Plan to which employees voluntarily contributed no more entitles Hughes to their money, than sponsorship of a Christmas club through which employees saved would entitle Hughes to funds not spent at the year's end. 29 U.S.C. §1144 expressly states that "neither an employee benefit plan... nor any trust established under such a plan shall be deemed to be an insurance company." The notion that plan assets derived from employee contributions, like an insurance company's holdings, belong to the employer as settlor and can be invested for employer profit as long as promised annuities are paid is fundamentally mistaken.

C. There is no conflict with other Circuits about the means for terminating an ERISA plan.

Petitioners' claim that the Ninth Circuit's holding conflicts with cases ruling that an ERISA plan may only be terminated pursuant to Title IV is another red herring. Pet. 21-5. Neither plaintiffs nor the Ninth Circuit ever suggested terminating the Plan through other means. Petitioners cite three cases holding what no one denies: that a plan can only terminate through Title IV. Pet. 22-3. At least two of the three also show that just as the Ninth Circuit held, a reluctant employer, in appropriate circumstances, can be ordered to use those means.

Thus *American Flint Glass Workers Union v. Beaumont Glass Co.*, 62 F.3d 574 (3d Cir. 1995), rejected a claim that an employer which sought to terminate a plan, but learned it was underfunded and could not be terminated pursuant to Title IV

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[11](...continued)
payments, when made, were to a defined contribution plan, the action challenged -- manipulation of a defined-benefit plan to divert its surplus to the employer -- resembled Hughes' action here. *Chait* clearly considered this important. It stressed "the equities and underlying policy questions presented by the facts." 835 F.2d at 1026.

without an additional employer contribution, was obligated by statute to proceed with the termination. The decision, however, *reversed* the dismissal of a claim that the employer had obligated itself contractually to terminate the plan. *Id.* at 580-1. In finding "a material issue of fact... concerning the parties' intent to impose on the Company a duty to provide the funding needed to secure IRS approval of termination," the court necessarily held that if this issue was resolved in plaintiffs' favor, the employer *could* be ordered to terminate the plan under Title IV despite its reluctance to do so.

Phillips v. Bebber, 914 F.2d 31, 34 (4th Cir. 1990), actually *ordered* plans to be "terminated in conformity with the procedures set forth in ERISA" -- the same result which is sought by plaintiffs here. That the Plan here was not terminated in conformity with Title IV -- and must be, since Hughes has frozen enrollment with a surplus so big the Plan is a wasting trust -- is the point of the complaint.

The third case cited by petitioners, *Matter of Esco Manufacturing Co.*, 50 F.3d 315 (5th Cir. 1995), held that a bankruptcy trustee replaced a plan's sponsor rather than its administrator (an employer-union committee). Thus ERISA's Title IV, which governs administrators, did not apply to the trustee. This issue, the only one discussed in *Esco*, has no possible relevance. Hughes is both the Plan's administrator and its sponsor. Par. 6 of the Complaint, App. 133a.[12]

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[12]Withdrawn opinions in *Esco*, 33 F.3d 509 (5th Cir. 1994), make its factual setting clearer and as in the case of other decisions cited by petitioners, make obvious that an employer *can*, in appropriate circumstances, be ordered to terminate a plan. The original majority and dissent agreed, *Id.* at 515 and 518, that "Someone must shoulder the responsibility for terminating the pension plan," in other words, that plans can be terminated regardless of the employer's wish. The (continued...)

The obvious point of requiring that employees who contributed to a plan get an equitable share of surplus on termination is to limit employers' ability to take for themselves the assets of such plans. If an employer could evade it simply by calling what amounts to a termination an "amendment" and not giving formal notice, § 1344 would have no meaning.

In a case not mentioned by petitioners, *In re Gulf Pension Litigation*, 764 F.Supp. 1149 (S.D.Tex. 1991), *aff'd in part sub nom., Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1699 (1995), the district court (in a holding not appealed) reached the same conclusion as the Ninth Circuit here, that a plan which had been converted to a wasting trust must be terminated, and accordingly ordered the defendant "to submit termination papers to PBGC." 764 F.Supp. at 1204-5, 1216. The same should be true of a judgment here (just as it was in *Phillips, supra*), and nothing in the Ninth Circuit's decision suggests otherwise.[13]

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[12](...continued)
dissent, *Id.* at 518, called it unnecessary to make the trustee act and create a conflict with bankruptcy law since "ERISA provides an alternative," a PBGC-initiated termination under 29 U.S.C. § 1342. For the overfunded Plan here, as in the *Gulf* case discussed below, this alternative does not exist.

[13] Petitioners have stressed that the PBGC must supervise any termination, a proposition that while true, has nothing to do with the validity of a complaint asking that Hughes be ordered to terminate the Plan. The *Gulf* Complaint, like the one here, alleged that plans "should be terminated" and surplus distributed, without mentioning the PBGC. 764 F.Supp. at 1201. *Gulf* first found the plans wasting trusts that should have been terminated and ruled there was equitable power to order them spun off "according to the terms of the Final Judgment" from a plan into which they had been merged. *Id.* at 1204-5. Only in (continued...)

The complaint's and decision's theory that pension plans, like other trusts, terminate once their purposes are accomplished was accepted in *Gulf* (764 F.Supp. at 1201-4),[14] and the petition cites no case in which the theory was rejected. Despite an effort by Judge Norris in dissent to distinguish them (App. 42a-44a), the facts on which *Gulf* found "wasting trusts that should have been terminated" -- that the employer closed participation in trusts "substantially overfunded as to all future liabilities" (*Id.* at 1204) -- are just like those alleged here. Par. 29 of the Complaint, App. 138a.

Petitioners (not the complaint, whose allegations should be accepted on a motion to dismiss) claim that even after the Plan was frozen in 1991, "66,000 Hughes employees... continued to accrue or receive benefits under the original contributory benefit structure." Pet. 5. How many employees continued to ***receive*** benefits is irrelevant to the Plan's having been frozen and a cap placed on the accrual of ***new*** benefits. That employees who could not be joined by new participants continued to accrue benefits does not distinguish *Gulf*, where the wasting trusts still had 2900 working participants with projected benefits from future service of $4 million, "***de minimis*** in relation to the surplus." 764 F.Supp. at 1203. Of course, such factual issues as exact figures for working participants and projected future benefits, or how many millions of dollars are ***de minimis*** in relation to a surplus, can neither be

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[13](...continued)
that judgment, *Id.* at 1216, was Chevron ordered to take "ministerial steps" including notice to the PBGC. It is Hughes, not plaintiffs, that seeks to bypass the PBGC by not proceeding with a formal termination.

[14] *Cf. Chambers v. Kaleidoscope, Inc. Profit Sharing Plan and Trust*, 650 F.Supp. 359, 372 (N.D.Ga. 1986) (ordering termination of defined contribution plan to prevent benefits from "end[ing] up in legal limbo forever").

decided on a motion to dismiss, nor serve as a basis for granting certiorari. The Ninth Circuit did not decide such factual questions, which are as yet undeveloped. App. 11a n. 3, 21a n. 6.

The relevant legal point is simple. If plan termination depended solely on an employer's choice of word -- in effect, the argument made by petitioners, without support in any reported case, and flatly contradicted by the ***Beaumont Glass*** decision on which they rely -- Title IV's safeguards would be shorn of meaning.

III. Contrary to the petition's claim that the decision below will have "staggering" consequences, the fact pattern alleged, which the Ninth Circuit held may be developed in discovery, is highly unusual.

The petition contends that the decision below "would adversely affect all kinds of employee-benefit plans" and have "staggering" consequences. Pet. 15. Apart from specious claims that the challenged employer decision was "routine," or that it might be impossible to distinguish contributory pension plans from welfare plans (see note 7 above), the contention is based entirely on a non-record estimate that contributory defined-benefit pension plans "cover more than 1 million American workers and retirees, and hold more than $60 billion in assets." Pet. 15-6.

The estimate, assertedly based on 1994 data, comes from a letter from "a global benefits consulting firm" to petitioners' lawyer. It is not part of the record. It says nothing about the amounts contributed by employees as compared with employers, which for most of the plans supplying data (since the letter defines as "significant" employee contributions of as little as $200 per year) were surely far smaller than is true of the Plan here. App. 149a-150a. Even setting both these problems aside, the letter's estimate of plan "assets" -- not ***surplus*** assets like those in this case -- underlines how atypical the Hughes Plan is.

According to the complaint, Hughes' Plan, when frozen, had $1.2 billion, half derived from employee payments, in surplus assets alone. App. 4a-5a, 137a. That is, it had $600 million in *surplus* assets ***derived from employee contributions*** alone! While no comparison with other plans is in the record (or relevant to the legal issues), petitioners' attempted reliance on a completely extraneous non-record estimate of plan ***assets*** (including those needed for accrued benefits, and those derived from employer contributions) shows the emptiness of their claim that review by this Court is appropriate. While it may be true that "[c]ontributory plans are common" (Pet. 15), plans like the Hughes Plan are not.

CONCLUSION

For these reasons, as well as others apparent from the decision below, the writ of certiorari should be denied.

Respectfully submitted,

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